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1987]

## Comments

### CUSTOMARY INTERNATIONAL LAW IN UNITED STATES COURTS

#### I. INTRODUCTION

In his recent law review article entitled *A Revisionist View of Customary International Law*, Professor Trimble provided a comprehensive survey and analysis of domestic courts' application of customary international law.<sup>1</sup> The article set forth an extensive discussion of three main categories of cases: human rights,<sup>2</sup> expropriation<sup>3</sup> and the extraterritorial application of law.<sup>4</sup> In examining these cases, Professor Trimble concluded, *inter alia*, that customary international law lacks political legitimacy and "should be applied by the judiciary only when its application can be satisfactorily justified on the basis of an independent domestic source of authority."<sup>5</sup> More specifically, he submitted that "courts should never apply customary international law except pursuant to political branch direction."<sup>6</sup>

This Comment reexamines a selection of cases from the three categories listed above and suggests that despite the diversity and changefulness of state practice in today's international society, common norms of conduct emerge from state practice and are binding on all states as customary international law. Domestic courts are equipped to apply such customary norms and by so doing will promote the development and enforcement of customary international law.

#### A. Background

As an introduction to this Comment, this section defines customary international law and describes its beginnings and current status as law in the United States. Constitutional, doctrinal and practical limitations on the ability of domestic courts to decide international matters are discussed. Also set forth is the process by which a court ascertains a norm of customary international law.

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1. See Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986).

2. *Id.* at 693-96.

3. *Id.*

4. *Id.* at 696-707. Professor Trimble also discussed customary international law cases involving sovereign and diplomatic immunity and the law of treaties, but these topics will not be addressed by this Comment. *Id.* at 688-92.

5. *Id.* at 672.

6. *Id.* at 716.

1. *Customary International Law*

Public international law deals with "the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."<sup>7</sup> The most authoritative enumeration of the sources of public international law is found in article 38(1) of the Statute of the International Court of Justice:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) international custom, as evidence of a general practice accepted as law;
- c) . . . general principles of law recognized by civilized nations;
- d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.<sup>8</sup>

This Comment focuses on one source of public international law, international custom.

Customary law is unwritten law that arises through an inductive process based on practice among states. Custom may be considered "the olde[st] and the original source of International Law."<sup>9</sup> As a source of international law, custom refers to conduct or knowing abstention from conduct, of members of a society which is part of the legal order of that society.<sup>10</sup> To become a binding rule of international law, a custom must be a practice that states follow and deem to be a legal obligation.<sup>11</sup> With respect to the latter requirement, such an obligation will not arise out of a practice done through courtesy or where a state believes that it is legally free to depart from a custom at any time. That is,

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7. 1 RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (Tent. Draft No. 6) (1985) [hereinafter RESTATEMENT (No. 6)].

8. *Statute of the International Court of Justice*, 1977 I.C.J. Acts & Docs. No. 3, at 77.

9. 1 L. OPPENHEIM, INTERNATIONAL LAW 25 & n.1 (8th ed., H. Lauterpacht, 1955).

10. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 290 (3d ed. 1986); see also A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

11. See H. STEINER & D. VAGTS, *supra* note 10, at 298 & n.29 (citing Hudson, *Working Paper on Article 24 of the Statute of the International Law Commission*, [1950] Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/16). The requirements for custom to become binding international law have been stated to be: "1) 'concordant practice' by a number of states relating to a particular situation; 2) continuation of that practice over 'a considerable period of time;' 3) a conception that the practice is required by or consistent with international law; and 4) general acquiescence in that practice by other states." H. STEINER & D. VAGTS, *supra* note 10, at 298 & n.29.

the practice must comply with the *opinio juris sive necessitatis*—a conviction that the rule is obligatory.<sup>12</sup> The United States Supreme Court has ruled that customary international law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>13</sup>

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12. H. STEINER & D. VAGTS, *supra* note 10, at 299; *see also* Case of the S.S. “*Lotus*,” 1927 P.C.I.J. (ser. A) No. 10 (leading case on *opinio juris*). An example of the customary international law process is given below:

During a period in the early years of the 20th century, the distance seaward within which a nation could exercise sovereignty or any other form of sovereign rights was limited to a narrow band seaward from its coastline. The United States and many other states maintained that the limit was 3 nautical miles. Some states, particularly Chile, Ecuador and Peru, sought an expanded territorial sea of 200 nautical miles. They claimed this zone and sought to exercise rights in the area as territorial sea. Other states, including the United States, treated that claim as a violation of international law and a struggle followed. In the end, the international community agreed that a 200-nautical mile territorial sea violates international law. A maximum limit of 12 nautical miles is now established for the territorial sea.

During the same period, the United States sought to expand coastal state jurisdiction seaward by advocating the legal regime of the continental shelf. At the time of President Truman’s 1945 Continental Shelf Proclamation, the regime of the continental shelf did not exist. No regime of automatic special coastal state resource rights in the seabed beyond the territorial sea had been articulated as a rule of customary international law. Absent, perhaps, historic rights, the law of the sea limited the coastal state’s exclusive resource rights to the narrow band of territorial sea. The United States initiated a rather rapid development of a new rule of law by claiming rights in the resources of the continental shelf, acting pursuant to the claim, and obtaining the acquiescence and support of other interested states. Until there was sufficient state practice and *opinio juris* to establish the new regime, the United States was in violation of the relevant customary international law.

Charney, *The Power of the Executive Branch of the United States to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 915 (1986) (footnote omitted).

13. *The Paquete Habana*, 175 U.S. 677, 700 (1900). For a discussion of *The Paquete Habana*, see *infra* notes 22-31 and accompanying text. In a recent opinion, Judge Bork discussed the intention of the constitutional framers to incorporate the law of nations as a part of law in the United States:

It was assumed by the framers and ratifiers of the Constitution that our obligations under international law would be honored. In the course of their rebellion, the American colonies were quick to assure the world that the ‘law of nations [would be] strictly observed.’ 14 J. CONT. CONG. 635 (1779). The Continental Congress, lacking meaningful authority, had to content itself with passing a resolution urging the states to provide judicial remedies for infringements of the rights of ambassadors. 21 J. CONT. CONG. 1336-37 (1781). This resolution was apparently ineffective, for Edmond Randolph was later, at the constitutional convention, to identify as one of the defects of the Articles of Confederation that ‘they could not cause infractions of treaties or of the law of nations, to be punished.’ . . . 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 19, 25 (1911). In arguing for ratification, John

2. *Comparison with Treaty Law*

Treaty law is the supreme law of the land according to the Constitution,<sup>14</sup> and is a major source of international law.<sup>15</sup> Treaties supersede all inconsistent state law, both prior and subsequent; therefore, states must accept and adhere to obligations specified in international agreements.<sup>16</sup> Treaty law also supersedes all prior federal law.<sup>17</sup> The "last-in-time" rule provides that where a conflict exists between a treaty and a federal statute, that which was enacted last will prevail.<sup>18</sup>

Whether the last-in-time rule governs application of customary international law with respect to inconsistent federal statutes is a central issue in evaluating the application of such law by domestic courts. The

Jay subsequently characterized it as 'of high importance to the peace of America that she observe the law of nations.' *The Federalist* No. 3, at 13 (P. Ford ed. 1898). *Accord*, Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 55-56 (1952) ('the Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of Nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States').

*Finzer v. Barry*, 798 F.2d 1450, 1456-57 (D.C. Cir. 1986).

14. U.S. CONST. art. VI, cl. 2. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.* (emphasis added).

15. See B. JANKOVIC, *PUBLIC INTERNATIONAL LAW* 273 (1984).

16. H. STEINER & D. VAGTS, *supra* note 10, at 582 ("[I]t is difficult to read the Supremacy Clause of the Constitution and escape the conclusion that a treaty supersedes inconsistent state law, whether . . . prior or subsequent thereto.").

17. See, e.g., *Whitney v. Robertson*, 124 U.S. 190 (1888) (federal statute imposing duty on sugar imports from Santa Domingo supersedes earlier treaty calling for duty-free imports). Professors Steiner and Vagts pointed out that this settled rule providing for the superiority of subsequent federal law over treaties is contrary to the writings of John Jay in *The Federalist* No. 64:

They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

THE FEDERALIST NO. 64 (J. Jay) (quoted in H. STEINER & D. VAGTS, *supra* note 10, at 587).

18. Murphy, *Customary International Law in U.S. Jurisprudence—A Comment on Draft Restatement II*, 20 INT'L PRACTITIONER'S NOTEBOOK 17, 17 (Oct. 1982).

*Restatement of Foreign Relations* provided in a 1980 tentative draft that, as with treaty law, customary international law prevails over an earlier inconsistent federal statute.<sup>19</sup> This proposition was widely criticized<sup>20</sup> and, in response, a subsequent 1985 revision was promulgated. The *Restatement's* drafters suggested that the supremacy of custom over earlier inconsistent federal laws had not been determined "authoritatively," but that circumstances clearly existed under which custom would prevail.<sup>21</sup>

Although disagreement as to application of the last-in-time rule to custom has existed, the seminal case establishing customary international law as part of the law of the United States, *The Paquete Habana*,<sup>22</sup> unequivocally indicated that customary international law is only a proper basis for a United States court decision "where there is no treaty, and no controlling executive or legislative act or judicial decision."<sup>23</sup> *The Paquete Habana* involved the appeal of a decision condemning two Spanish fishing vessels and their cargo as a prize of war during the Spanish American War.<sup>24</sup> A blockade was instituted under United States law by both presidential proclamations and federal law declaring war between Spain and the United States.<sup>25</sup> The seized vessels were unarmed and had made no attempt to run the blockade or to resist capture.<sup>26</sup> At trial, the issue arose whether the vessels were properly subject to capture, because an ancient doctrine had recognized such fishing vessels as exempt from capture as prize of war.<sup>27</sup> As it had been contested in the past, the Court reviewed the history of the doctrine to determine its present status as binding customary international law.<sup>28</sup> The Court held:

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19. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment j, reporters' note 4 (Tent. Draft No. 1, 1980).

20. See, e.g., Goldklang, *Back on Board The Paquete Habana: Resolving The Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984); Murphy, *supra* note 18, at 17-18.

21. RESTATEMENT (No. 6), *supra* note 7, § 135 comment d; see also Trimble, *supra* note 1, at 678 & n.52. Professor Trimble stated that "it seems clear that the drafters envision some situations in which a norm of customary international law would supersede an act of Congress." *Id.* at 678 n.52.

22. 175 U.S. 677 (1900).

23. *Id.* at 700.

24. *Id.* at 678. The ships involved were run out of Havana, were owned by a Spanish subject and sailed under the Spanish flag. *Id.*

25. *Id.* At the onset of the Spanish American War, the United States established a blockade of the northern coast of Cuba. *Id.* at 712. In 1898, the vessels were seized by a blockading squadron and sold at auction in the United States. *Id.* at 678-79.

26. *Id.* at 678.

27. *Id.* at 686. The Court stated that "[b]y an ancient [custom and] usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." *Id.*

28. *Id.* at 687-708.

[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing the peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.<sup>29</sup>

The Court concluded that international law, although established "independently of any express treaty or other public act," is part of the law of the United States, and "[f]or this purpose, *where there is no treaty, and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations."<sup>30</sup> The Court found the capture of the vessels unlawful.<sup>31</sup> Thus, custom is recognized as the supreme law of the land.<sup>32</sup>

### 3. *International Matters Before Domestic Courts*

Any consideration of domestic courts' application of customary international law must be prefaced by a discussion of the constitutional and doctrinal limitations which preclude domestic courts from deciding international matters, whether treaty law, customary law or foreign policy are implicated.

#### a. Political Question Doctrine

Based on history and the structure of the Constitution, broad foreign affairs powers are accorded to the national government.<sup>33</sup> Under the political question doctrine,<sup>34</sup> issues which are primarily political in

29. *Id.* at 708.

30. *Id.* at 700, 708 (emphasis added).

31. *Id.* at 714.

32. See Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 290, 290-91 (1982).

33. See G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985). The doctrine of separation of powers arises from the structure of the Constitution: legislative powers are set forth in article I, executive powers in article II and judicial powers in article III. See U.S. CONST. arts. I-III. Therein, certain explicit foreign affairs powers are granted Congress and the Executive. The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations" and "[t]o declare War." *Id.* art. I, § 8, cls. 3 & 11. The Constitution grants the Executive the power to be commander in chief and to make treaties with the advice and consent of the Senate. See *id.* art. II, § 2, cls. 1 & 2.

34. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.15, at 102 (3d ed. 1986). The political question doctrine states that certain matters brought before courts are "really political in nature and best resolved by the body politic rather than suitable for judicial review." *Id.* The authors noted that as "all constitutional interpretations have political consequences," the doctrine should more properly be known as the doctrine of "nonjusticiability." *Id.* (quot-

nature are inappropriate for judicial review and are non-justiciable.<sup>35</sup> Issues involving foreign affairs often fall squarely within the scope of the political question doctrine, primarily because such questions “uniquely demand single-voiced statement of the [g]overnment’s views.”<sup>36</sup> An example of the political question doctrine as applied to the President’s foreign affairs power is *Goldwater v. Carter*.<sup>37</sup> In this case, a plurality of the Supreme Court held that the Court could not decide the issue of whether the President could terminate a treaty without congressional approval.<sup>38</sup> Justice Rehnquist stated in a concurring opinion that the question presented was non-justiciable because it involved “the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.”<sup>39</sup> Justice Rehnquist emphasized that the dispute raised implications of foreign relations which provided “compelling” evidence that the case was within the political question doctrine.<sup>40</sup>

#### b. Foreign Sovereign Immunity

When a foreign sovereign state or a state instrumentality is named as a party to an action brought in a United States court, the Foreign Sovereign Immunities Act of 1976 (FSIA) may operate to grant jurisdic-

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ing R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM* 56 (1955)). The latter name would better emphasize that the issue is one inappropriate for judicial consideration. *Id.*

35. *Id.* at 102-10. The Supreme Court summarized the political question doctrine as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

36. *See Baker v. Carr*, 369 U.S. 186, 211 (1962).

37. 444 U.S. 996 (1979). This case involved a claim brought by Congressmen that President Carter’s action in terminating a treaty with Taiwan was unconstitutional because Congress had not participated in the termination. *Id.* at 997-98 (Powell, J., concurring).

38. *Id.* at 997-98, 1002 (Powell, J., concurring).

39. *Id.* at 1002 (Rehnquist, J., concurring). This concurring opinion was joined by Chief Justice Burger and Justices Stewart and Stevens.

40. *Id.* (Rehnquist, J., concurring). Specifically, Justice Rehnquist noted that the validity of a treaty commitment to use military force was at issue. *Id.* at 1002-03 (Rehnquist, J., concurring).



tional immunity to the state or its instrumentality.<sup>41</sup> The FSIA was enacted in 1976 to codify a common-law doctrine under which a state was immune from jurisdiction in a United States court, except where the state was acting in a private or a commercial capacity.<sup>42</sup> The FSIA specifically provides that a state is immune from the jurisdiction of courts of the United States except for a case in which: 1) the state has waived immunity; 2) the state is acting in a commercial capacity or 3) property was taken in violation of international law and such property was in the United States in connection with a commercial activity carried on by the state.<sup>43</sup>

### c. Act of State Doctrine

The act of state doctrine is a judicial doctrine under which a United States court must refrain from deciding a case, notwithstanding its proper exercise of jurisdiction, because the case calls into question the act of a foreign sovereign state.<sup>44</sup> A modern statement of the doctrine is found in the Supreme Court's opinion in *Banco Nacional de Cuba v. Sabbatino*.<sup>45</sup> The court stated:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.<sup>46</sup>

*Sabbatino* involved a claim by the Castro government for payment owed to a nationalized Cuban sugar company by a United States importer.<sup>47</sup>

41. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1602-1611 (1982)).

42. See Note, *The Act of State Doctrine and Allied Bank*, 31 VILL. L. REV. 291, 292 n.6 (1986).

43. 28 U.S.C. § 1605(a)(1)-(3) (1982).

44. See Note, *supra* note 42, at 295-316 (discussing application and policy of act of state doctrine in United States case law); see also H. STEINER & D. VAGTS, *supra* note 10, at 726 (defining act of state doctrine); see generally Bayzler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1985) (recent comprehensive overview of the act of state doctrine).

45. 376 U.S. 398 (1964).

46. *Id.* at 428.

47. *Id.* at 405. In *Sabbatino*, the respondent, an American commodity broker, contracted with a Cuban corporation largely owned by United States residents to buy Cuban sugar. *Id.* at 401. Following the United States government's reduction of its Cuban sugar quota, the Castro regime expropriated the corporation's property and rights. *Id.* at 403-04. To secure permission of the Cuban government to ship the sugar, the broker undertook a new contract and agreed to make payment for the sugar to a Cuban instrumentality. *Id.* at 404-05. Thereafter, the bills of lading were again transferred to the petitioner, another Cuban instrumentality. *Id.* at 405. The bank instructed its New York agent to

The Supreme Court reversed the lower court's decision which denied payment on the ground that the nationalization of the company was in violation of international law.<sup>48</sup> The Supreme Court, instead, applied the act of state doctrine, reasoning that application of the doctrine is required when adjudication of an act of a foreign sovereign state may impede foreign relations goals sought by the political branch.<sup>49</sup> The Court added, however, that the act of state doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state."<sup>50</sup> Rather, the Court noted that the doctrine is properly applied when there is little or no codification or consensus regarding an issue of international law and where the sovereign's act implicates an important or sensitive issue of foreign policy.<sup>51</sup>

#### d. Executive Suggestions

When a domestic case implicates some aspect of foreign policy, the executive branch has established a practice of intervening in the case to suggest an outcome.<sup>52</sup> Courts often comply with the executive suggestion in cases with international implications to avoid conflicts with executive branch foreign policy.<sup>53</sup> According to some courts<sup>54</sup> and to a plurality of the Supreme Court,<sup>55</sup> deference is compulsory whenever the executive intervenes in an act of state case.<sup>56</sup>

The doctrine of compulsory deference to executive suggestions re-

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deliver the bills of lading to the broker, who accepted them, received payment for the sugar from its customer, but refused to deliver the proceeds to the Cuban instrumentality. *Id.* at 405-06.

48. *Id.* at 428.

49. *Id.* at 423-27.

50. *Id.* at 423.

51. *Id.* at 428.

52. See Note, *Acts of State and Conflicts of Laws*, 35 N.Y.U. L. REV. 234, 238-40 (1960).

53. See R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER*, 86-102 (1964) (discussing judicial deference to executive policy).

54. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (per curiam) (where state department issued definitive expression of executive policy as to exercise of American courts' jurisdiction to pass upon validity of acts of Nazi officials, court amended its previous mandate to comply); see also Note, *supra* 42, at 313-16 (discussing the *Bernstein* cases).

55. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (plurality opinion). In *First National City Bank*, the respondent brought an action to recover excess collateral it had pledged with petitioner to secure a loan. *Id.* at 760. The petitioner, an American banking concern, counterclaimed for that excess as an offset against the value of petitioner's property in Cuba which the Castro government had expropriated without compensation. *Id.* at 761. The Supreme Court reversed the court of appeals holding that the act of state doctrine barred assertion of the counterclaim. *Id.* at 762-76.

56. For a discussion of the act of state doctrine, see *supra* notes 44-51 and accompanying text.

garding recognition of an act of state arose in *Bernstein v. Van Heyghen Freres Societe Anonyme*.<sup>57</sup> This has become known as the "Bernstein exception" to the act of state doctrine. The *Bernstein* case involved a claim by plaintiff for the value of a shipping vessel which the Nazi's seized during World War II.<sup>58</sup> The Second Circuit found that the Nazi seizure was an act of a foreign sovereign state which a domestic court could not review.<sup>59</sup> However, the court noted that if the executive branch were to suggest a different result, the court could find the act of state doctrine inapplicable and could adjudicate the confiscatory acts of the Nazi government.<sup>60</sup> Thus, in a later action which the same plaintiff brought, the court relied on a letter to the court from the State Department in its refusal to apply the act of state doctrine.<sup>61</sup>

#### e. Treaty Law

In addition to the above limitations upon domestic courts' ability to decide international matters, the growing body of treaty law operates to diminish the likelihood that a question of international custom will arise in a United States court. Since World War II, treaty law has proliferated in the United States and elsewhere.<sup>62</sup> Treaties cover a variety of both national and private interests.<sup>63</sup> Additionally, "declaratory" treaties may supplant norms of customary international law.<sup>64</sup> In this way, trea-

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57. 163 F.2d 246 (2d Cir.) (action for conversion of the plaintiff's ship), *cert. denied*, 332 U.S. 772 (1947).

58. *Id.* at 247.

59. *Id.* at 248-51.

60. *Id.* at 251. The court stated: "[T]he only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary." *Id.*

61. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stroomvaart-Maat-Schappij*, 173 F.2d 171 (2d Cir. 1949), *modified per curiam*, 210 F.2d 375 (2d Cir. 1954).

62. See H. STEINER & D. VAGTS, *supra* note 10, at 327 (stating United Nations Treaty Series reproducing treaties registered with the U.N. Secretariat exceeds one thousand volumes and the older League of Nations Series had two hundred and five volumes).

63. See *id.* Some treaties may reach national political interests such as treaties establishing peace settlements or weapons limitations, while others may affect private parties indirectly such as agreements on foreign aid. *Id.* Some treaties, such as tariff accords, may directly and specifically affect private parties. *Id.*

64. *Id.* at 361. The extent to which a treaty may generate customary law is a subject of debate with theorists divided roughly into "positivist" and "activist" camps. *Id.* For an activist theorist, a succession of bilateral treaties among several states may give rise to a customary norm which binds a state not a party to any of the treaties. *Id.* An activist would reason that: "[A] solution worked out by statement of important and interested nations and ratified by their governments is apt to be the most practical and satisfying one. That solution . . . should be considered relevant or persuasive for the development of a customary rule setting standards for all countries." *Id.*; see *North Continental Sea Cases*,

ties serve to “codify” customary international law, a situation somewhat analogous to statutory laws supplanting common law.<sup>65</sup>

#### f. Arbitral Tribunals

In many circumstances, the United States has made claims on behalf of its nationals that perhaps otherwise would be brought before domestic courts. Often, such claims are mandatorily submitted to binding arbitration before international arbitral tribunals.<sup>66</sup> This may be done by treaties which contain “compromissory clauses” requiring parties to a treaty to submit their disputes to arbitration.<sup>67</sup> Some arbitral tribunals are established by special agreement.<sup>68</sup> A prominent example is the Iran-United States Claims tribunal, established after the settlement of the 1979 Iranian hostage crisis.<sup>69</sup> After the hostages were seized and confined in the U.S. Embassy in Tehran, President Carter issued a declaration blocking the removal of all property and interests of the Government of Iran in the United States.<sup>70</sup> In 1981, when the hostages were released, a settlement was reached whereby both Iran and the United States agreed to terminate all litigation brought by their nationals.<sup>71</sup> An arbitral tribunal was established to settle litigation, and Iran agreed to transfer \$1 billion to a British bank for satisfaction of the arbitral awards.<sup>72</sup> The Supreme Court upheld the constitutionality of arbitral scheme in *Dames & Moore v. Regan*.<sup>73</sup> There, the Court found that, although the President does not have plenary powers to settle claims, he could exercise such power in certain circumstances.<sup>74</sup>

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1969 I.C.J. 3, *reprinted in*, 8 INT’L LEGAL MATERIALS 340 (1969). (World Court provides analysis of whether boundary treaty created customary law binding nonparty).

Positivists would argue that treaties among party-nations could never give rise to a norm binding non-parties. The positivist would find that “[t]he treaty structure among other countries simply constitutes an exception to a body of customary law which has left [the non-party state’s] discretion unimpaired.” H. STEINER & D. VAGTS, *supra* note 10, at 361.

65. See H. STEINER & D. VAGTS, *supra* note 10, at 327-28. The analogy between treaty law and domestic legislation is useful but limited. A treaty is consensual and normally binds only parties, while a statute validly adopted by the legislature binds all members of the society. *Id.* at 328. Unlike a treaty, legislation adopted by majority rule may bind dissenters. *Id.* at 328.

66. See *id.* at 228-32.

67. *Id.* at 229. Such compromissory clauses relate only to disputes arising from the provisions of the treaty in which they are contained. *Id.* An example would be “a compromissory clause in a treaty fixing land boundaries requiring arbitration only for conflicts over those boundaries.” *Id.*

68. *Id.* at 171.

69. *Id.* at 172.

70. *Id.* (discussing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)).

71. *Id.* (discussing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)).

72. *Id.*

73. 453 U.S. 654 (1981).

74. *Id.* at 688. The Court held:

4. *Ascertaining a Norm of Customary International Law*

In an international case, where constitutional and doctrinal limitations are inapplicable, executive branch direction has not been offered and where the issue involved is not covered by treaty or committed to an arbitral scheme, a domestic court may be faced with the task of ascertaining and applying a norm of customary international law. To ascertain a norm, a court must look to the "raw material" of international custom—state practice.<sup>75</sup> Any state action or inaction, articulation or silence may be state "practice" if the state's behavior manifests a recognition of a customary norm.<sup>76</sup> To rise to a level of a customary norm, the state action must be evident to other states "within a reasonable period of time."<sup>77</sup> The Supreme Court has stated that state practice may be evidenced by "consulting the works of jurists, writing professedly on public law; or by general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>78</sup>

Widespread state practice is necessary to establish a norm of customary law.<sup>79</sup> Although it is not necessary to prove that states unanimously adopt a practice, it remains unclear how many states must adopt a practice to establish a customary norm of law.<sup>80</sup> Ascertaining a cus-

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We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

*Id.*

75. M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, 4 (1985).

76. *Id.* For a further discussion of this element known as *opinio juris*, see *supra* at notes 11-12 and accompanying text.

77. M. VILLIGER, *supra* note 75, at 4.

78. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). The instruction of *United States v. Smith* was reiterated by *The Paquete Habana*:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals, not for speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700 (emphasis added); see also M. VILLIGER, *supra* note 75, at 4 & n.20 (quoting [1950] Y.B. INT'L L. COMM'N 187, U.N. Doc. 368ff). For further discussion of proving customary norms, see S. ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW, 55-82 (1984). For an extensive proposal of how a court may determine the existence of a custom and *opinio juris*, see Glennon, *Custom in Separation of Powers Disputes*, 64 B.U.L. REV. 109, 128-44 (1984).

79. See Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 556 (1986).

80. *Id.* One source of evidence of the existence of a norm is when a state

tomary norm is made more complex with the existence in the world today of over 150 sovereign states with a multiplicity of state practices and ideologies.<sup>81</sup> In particular, since World War II, socialist and Third World states have "insisted on the need radically to revise old customary rules, which appeared to them to be the distillation of traditional Western values . . . , the quintessence of the outlook they oppose."<sup>82</sup>

## II. UNITED STATES COURTS' APPLICATION OF CUSTOMARY INTERNATIONAL LAW

United States' courts have applied customary international law in a variety of cases involving law of the sea, diplomatic immunity, sovereign immunity and treaty interpretation, as well as other matters.<sup>83</sup> This Comment will next discuss three leading categories of customary international law cases: international human rights,<sup>84</sup> expropriations<sup>85</sup> and the extraterritorial application of law.<sup>86</sup>

### A. Human Rights

#### 1. Introduction

The western view of international human rights is generally cast in terms of minimum standards limiting government conduct with respect

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actively protests the breach of a norm. *Id.* On the other hand, tacit approval can be evidence:

One means of evaluating the assent of states to the obligatory nature of a practice is to measure the degree to which non-acting states exhibited tacit approval of the positive acts of other states. Even more probative is consistent conformity with the norm against a background of public articulation of the norm's obligatory character by other states or international bodies.

*Id.* at 556-57 (footnotes omitted). Tacit assent may also be inferred where a state's internal laws are consistent with the norm. *Id.* at 557.

81. See Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 HOUSTON J. INT'L L. 59, 60 (1981-82) (discussing problem of applying customary international law "in a world of more than one hundred fifty sovereign states" whose national laws and votes in the United Nations "do not always coincide").

82. A. CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 180-83 (1986).

83. See generally T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 96-185 (1987) (chapter relating to "The Law of Nations as Incorporated into United States Law"). The authors provided cases and other materials to illustrate the application of customary international law in cases involving human rights, the punishment of privacy and terrorism, extraterritoriality, expropriation and sovereign immunity. *Id.*

84. For a discussion of international human rights cases, see *infra* notes 100-42 and accompanying text.

85. For a discussion of expropriation cases, see *infra* notes 152-94 and accompanying text.

86. For a discussion of extraterritoriality cases, see *infra* notes 199-224 and accompanying text.

to individual freedom.<sup>87</sup> In 1948, the United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights.<sup>88</sup> The Declaration addresses a broad range of rights including freedom from torture, equal protection and due process.<sup>89</sup> The Declaration was initially intended as a non-binding statement of principles, but has grown in influence so that it may have the status of custom or general principles.<sup>90</sup>

Since World War II, other far-reaching human rights treaties have become effective, including the Genocide Convention and The International Covenant on Civil and Political Rights.<sup>91</sup> A Human Rights Committee was established under the latter treaty.<sup>92</sup> This Committee is comprised of eighteen members, representing “‘different forms of civilization,’ ” and has three main duties:<sup>93</sup> 1) it studies reports submitted by member states about states’ human rights measures;<sup>94</sup> 2) it receives complaints from member states regarding human rights violations by other member states<sup>95</sup> and 3) at the option of a member state, it may

87. See M. SHAW, *INTERNATIONAL LAW* 173 (2d ed. 1986). Dr. Shaw states: “[D]ue process, freedom of expression, assembly and religion, and political participation in the process of government,” are the fundamental rights recognized under international law. *Id.*

The source of these rights under the traditional view of western states is the individual consent of the governed. Dr. Shaw provides a comparison with the Soviet notion of human rights:

The approach of the Soviet Union has been to note the importance of basic rights and freedoms for international peace and security, but to emphasize the role of the state. Indeed, the source of human rights principles is seen as the state. . . .

. . . [T]he focus is not upon the individual (as in western conceptions of human rights) but solely upon the state.

*Id.* at 174; see also H. STEINER & D. VAGTS, *supra* note 10, at 402-79.

88. See M. SHAW, *supra* note 87, at 179.

89. See *id.* The broad range of rights addressed include: liberty and security of the person (article 3), equality before the law (article 7), effective remedies (article 8), due process (articles 9 and 10), prohibitions on torture (article 5) and arbitrary interference with privacy (article 12) . . . rights protecting freedom of movement (article 13), asylum (article 14), expression (article 19), conscience and religion (article 18) and assembly (article 20).

*Id.*

90. *Id.* Professors Steiner and Vagts suggest that the Declaration has been “so frequently invoked in international fora as an authoritative statement of human rights and its provisions have been drawn upon in the drafting of so many human rights treaties that the Declaration itself has over time acquired the force of law.” H. STEINER & D. VAGTS, *supra* note 10, at 439.

91. See M. SHAW, *supra* note 87, at 180-82.

92. See *id.* at 182 & n.53.

93. See H. STEINER & D. VAGTS, *supra* note 10, at 448.

94. *Id.* at 448-49 (“[A] party to the Covenant can declare . . . that it recognizes the Committee’s competence to receive communications from another party to the effect that the (declaring) party is not fulfilling its obligations under the Covenant.”).

95. *Id.* at 449.

receive complaints from individuals who claim violations of human rights by that state.<sup>96</sup> The Committee is a prominent example of post-World War II enforcement efforts in the area of international human rights.

Generally, under principles of international law, a state may not question the internal affairs of another state.<sup>97</sup> However, it may not be appropriate for states to invoke this general rule in the area of human rights.<sup>98</sup> Under the rule requiring the exhaustion of local remedies, states may generally resort to international measures only where internal remedies would not be available or would be unreasonably difficult to attain.<sup>99</sup>

## 2. Case Law

In *Filartiga v. Pena-Irala*,<sup>100</sup> a unanimous Second Circuit held that "international law confers fundamental rights upon all people vis-a-vis their own governments."<sup>101</sup> In this case, the Filartigas, citizens of Paraguay, brought suit in the District Court for the Eastern District of New York against America Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's son, Joelito, in retaliation for his father's political activities.<sup>102</sup> Joelito was allegedly kidnapped

96. *Id.*

97. See M. SHAW, *supra* note 87, at 204 ("The basic rule of international law providing that states have no right to encroach upon the preserve of other states' internal affairs is a consequence of the equality and sovereignty of states and is mirrored in . . . the U.N. Charter.").

98. *Id.* at 204 & n.174.

99. *Id.* at 204-05. This is known as the "Exhaustion of Domestic Remedies Rule." *Id.* at 204 & n.175. This rule is grounded on the policy that states should have an opportunity "to solve their own internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked." *Id.* at 204-05 & n.176.

100. 630 F.2d 876 (2d Cir. 1980).

101. *Id.* at 885. In this case, plaintiffs were citizens of Paraguay. Dr. Filartiga was an opponent of the government of President Alfredo Stroessner. *Id.* at 878. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa and had since applied for permanent political asylum. *Id.*

102. *Id.* Dr. Filartiga commenced a criminal action in Paraguayan courts against Pena and the police for the murder of his son. *Id.* As a result of commencing this action, Dr. Filartiga's attorney was arrested and brought to police headquarters where he was shackled to a wall and threatened with death. *Id.* Later the attorney was allegedly disbarred without just cause. *Id.*

During the course of the Paraguayan proceeding, Hugo Duarte, who lived with Pena and who was the son of Pena's girlfriend, confessed to the murder. *Id.* at 878 & n.1. Duarte claimed that Joelito was having an affair with his wife and that he committed the murder in the heat of passion when he discovered his wife with Joelito. *Id.* at 878. This claim allegedly contradicted the results of three independent autopsies demonstrating that Joelito's death "'was the result of professional methods of torture.'" *Id.* at 878. Despite his confession, Duarte was never convicted for the crime. *Id.* This action was still pending four years later when the Filartigas' appeal reached the Second Circuit. *Id.*



and tortured to death by Pena, who was then Inspector General of Police in a Paraguayan city.<sup>103</sup> In 1979, Dolly Filartiga, who had emigrated to the United States, learned that Pena was in New York. She filed suit against him on behalf of herself and her father alleging subject matter jurisdiction based on the Alien Tort Statute, codified at 28 U.S.C. § 1350.<sup>104</sup>

The Filartigas sued Pena in tort for wrongful death by torture.<sup>105</sup> The cause of action was based on, *inter alia*, a violation of "documents and practices constituting the customary international law of human rights and the law of nations."<sup>106</sup> The Filartigas submitted the affidavits of a number of distinguished scholars who stated unanimously that "the law of nations prohibits absolutely the use of torture as alleged in the complaint."<sup>107</sup>

The district court dismissed the Filartigas' complaints on jurisdictional grounds, although it recognized that "official torture violates an

103. *Id.* On the day of Joelito's death, the police brought Dolly to Pena's home and showed her Joelito's severely disfigured body. *Id.* As she ran from the house, Pena shouted "[h]ere you have what you have been looking for for so long and what you deserve. Now shut up." *Id.*

104. *Id.* at 879 (citing 28 U.S.C. § 1350 (1982)). The Alien Tort Statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* The statute is derived from the First Judiciary Act of 1789 under which federal district courts were granted original jurisdiction over civil actions "where an alien sues for a tort in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1982)).

105. *Filartiga*, 630 F.2d at 879.

106. *Id.* Other causes of action were based on "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; [and] the American Declaration of the Rights and Duties of Man." *Id.*

107. *Id.* at 879 & n.4. The following is a summary of the scholarly opinions:

Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, and a former Vice President of the American Society of International Law, avers that, in his judgment, "it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Thomas Franck, professor of international law at New York University and Director of the New York University Center for International Studies offers his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Finally, Myres MacDougal, a former Sterling Professor of Law at the Yale Law School, and a past President of the American Society of International Law, states that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states."

*Id.* at 879 n.4.

emerging norm of customary international law."<sup>108</sup> The court reasoned that dicta in two recent cases compelled the court to construe the jurisdictional grant under section 1350 narrowly and as excluding "law which governs a state's treatment of its own citizens."<sup>109</sup>

The Second Circuit reversed the jurisdictional decision and remanded the case.<sup>110</sup> The court found that federal courts do have jurisdiction under section 1350 where there exists a violation of a rule or norm of customary international law.<sup>111</sup> Section 1350, the court reasoned, includes the emerging law of international human rights.<sup>112</sup> The court held that section 1350, as construed in *Filartiga*, is not an authorization to create new law, but rather a grant of subject matter jurisdiction over claims based on rights already recognized under international law.<sup>113</sup> The court employed the following sources as evidence of a norm of customary international law prohibiting torture: 1) treaty law, including the United Nations Charter;<sup>114</sup> 2) United Nations declarations;<sup>115</sup> 3) the domestic constitutions and laws;<sup>116</sup> 4) State Department reports summarizing United States diplomatic contacts on the subject of torture<sup>117</sup> and 5) writings of international scholars.<sup>118</sup> Based on this evidence, the court held that "international law confers fundamental rights upon all people vis-a-vis their own governments."<sup>119</sup>

Four years after the *Filartiga* opinion, at least one member of the Court of Appeals for the District of Columbia questioned the Second Circuit's construction of section 1350 in *Tel-Oren v. Libyan Arab Repub-*

108. *Id.* at 880.

109. *Id.* (citing *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975)).

110. *Id.* at 889. Amicus briefs were submitted by the Justice and State Departments, as well as by human rights organizations: Amnesty International-U.S.A.; Lawyer's Committee for International Human Rights; The International Human Rights Law Group; The Counsel on Hemispheric Affairs and The Washington Office on Latin America. *Id.* at 877.

111. *Id.* at 878.

112. *See id.* at 884-85.

113. *See id.*

114. *Id.* at 883-84.

115. *Id.* at 881-83.

116. *Id.* at 884.

117. *Id.*

118. *Id.* at 883. For a further discussion of the sources of customary international law, see *supra* notes 75-82 and accompanying text.

119. 630 F.2d at 884-85. The court added that "while the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them." *Id.* at 885. The court found that this result would apply wherever "an alleged torturer is found and served with process by an alien within our borders." *Id.* at 878 & n.124. The case was remanded to the District Court for the Eastern District of New York. *See Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). The district court implemented the Second Circuit's holding and entered a default judgment including punitive damages against Pena in excess of \$10 million. *Id.* at 867.

*lic*.<sup>120</sup> This case involved a 1978 terrorist incident in Israel.<sup>121</sup> The plaintiffs were survivors and representatives of persons murdered in the 1978 attack.<sup>122</sup> The plaintiffs based their jurisdiction, in part, on section 1350, alleging multiple tortious acts by five defendants—Libya, the PLO, the Palestine Information Office, the National Association of Arab Americans and the Palestine Congress of North America (PCNA).<sup>123</sup>

The district court dismissed the complaint on several jurisdictional grounds and the appellate court affirmed the dismissal.<sup>124</sup> The appellate panel consisted of Senior Judge Robb and Judges Edwards and Bork. The panel dismissed the complaint in a one page per curiam opinion but provided three separate concurring opinions.

Judge Bork's concurring opinion stated that the plaintiffs' complaint should be dismissed because adjudication was not appropriate in light of separation of powers principles.<sup>125</sup> Judge Bork found that no

120. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

121. *Id.* at 775. Thirteen heavily armed members of the PLO left Lebanon for Israel under instructions to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israeli jails. *Id.* at 799. If the plans went awry, the terrorists had been instructed to execute their hostages. *Id.*

The terrorists landed by boat, made their way to a highway where they stopped and seized a civilian bus, a taxi, a car and later, a second civilian bus, taking the passengers hostage. *Id.* All of the hostages were gathered on a single bus and the terrorists began driving to Tel Aviv. *Id.* Along the way, the terrorists killed some of the hostages and several occupants of passing cars. *Id.* Police finally halted the bus by shooting its tires and engines. *Id.* The terrorists reacted by killing several more hostages and finally by blowing up the bus with grenades. *Id.*

122. *Id.* at 775.

123. *Id.* at 775 & n.1.

124. *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). Following is a summary of the district court's disposition:

The district court dismissed on several jurisdictional grounds. First the court held that it lacked subject matter jurisdiction since the plaintiff could not demonstrate a private cause of action sufficient to meet the requirements of either 28 U.S.C. § 1331 or 28 U.S.C. § 1350. In addition, the court found the allegation against the three Arab-American groups—the PLO, the NAAA, and the PCNA—too vague and conclusory to trigger the requirements of section 1350. Alternatively, the court found that all the claims, which alleged intentional torts, were barred by the local statute of limitations. In sum, because the plaintiffs had failed to demonstrate that the law of nations, pertinent treaties, or section 1350 itself provided a cause of action, jurisdiction would not lie under the Alien Tort Statute.

Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127, 146 (1986) (footnotes omitted).

125. *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring). Judge Bork stated that the case contained allegations of activity that was of a "politically sensitive nature" and would thus present "in acute form, many of the problems that the separation of powers principles inherent in the act of state and political question doctrines caution courts to avoid." *Id.* at 808 (Bork, J., concurring). Therefore, Judge Bork concluded that the case was of the type not "appropriate for federal-

treaty provided plaintiffs with a cause of action.<sup>126</sup> A mere violation of customary international law, according to Judge Bork, could not provide a cause of action in United States courts.<sup>127</sup> Judge Bork reasoned that section 1350 grants jurisdiction for torts committed in violation of the "law of nations" or "treaties of the United States."<sup>128</sup> Violation of the law of nations (customary international law), reasoned Judge Bork, stands in parity with treaties as a basis for a cause of action.<sup>129</sup> If violation of customary international law would provide a cause of action, then violation of a treaty would also.<sup>130</sup> Such reasoning would suggest that "all existing treaties became, and all future treaties will become, in effect, self-executing when ratified."<sup>131</sup> Judge Bork found that such a result would contravene two hundred years of jurisprudence.<sup>132</sup> Therefore, only a rule of international law which itself provides for enforcement by *individuals* should give rise to a cause of action in United States courts.<sup>133</sup>

Judge Bork also concluded that international law generally addresses states and not individuals.<sup>134</sup> He thus criticized the *Filartiga* rea-

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court adjudication, at least not without an express grant of a cause of action." *Id.* (Bork, J., concurring).

126. *Id.* at 808-10 (Bork, J., concurring). In their complaint, the plaintiffs had alleged that the defendants violated thirteen "treaties of the United States." *Id.* at 809 (Bork, J., concurring). Upon examination, however, Judge Bork found that only five of the treaties were then binding on the United States. *Id.* at 808-09 (Bork, J., concurring). The five binding treaties were: 1) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War; 2) Convention With Respect to Law and Customs of War on Land; 3) The Charter of the United Nations; 4) Geneva Convention Relative to the Treatment of Prisoners of War of 1949 and 5) OAS Convention of 1971 on Terrorism. *Id.* at 809-10 (Bork, J., concurring). Judge Bork found that the language of these treaties called for implementing legislation by state parties or imposed obligations on the parties to fulfill in good faith the purposes of the treaties. *Id.* at 809 (Bork, J., concurring). Accordingly, the treaties were not "self-executing" and did not grant individuals a cause of action to seek damages for violation of their provisions. *Id.* (Bork, J., concurring). A self-executing treaty is a treaty "that manifests an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States . . . [and so] is effective as domestic law of the United States. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1965); see also RESTATEMENT (No. 6), *supra* note 7, § 131.

127. *Tel-Oren*, 726 F.2d at 816-19 & n.25 (Bork, J., concurring).

128. *Id.* at 820 (Bork, J., concurring).

129. *Id.* (Bork, J., concurring).

130. *See id.* (Bork, J., concurring).

131. *Id.* (Bork, J., concurring).

132. *Id.* (Bork, J., concurring) ("This conclusion stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in such a little-noticed statute.").

133. *See id.* at 816 (Bork, J., concurring).

134. *See id.* at 816-17 (Bork, J., concurring). Judge Bork relied on Oppenheim, a prominent international scholar:

Since the Law of Nations is based on the common consent of individual

soning "because the court there did not address the question [of] whether international law created a cause of action that the private parties before it could enforce in municipal courts."<sup>135</sup>

In contrast, Judge Edwards agreed with the explication of section 1350 set forth in *Filartiga*.<sup>136</sup> However, in light of the factual distinctions between *Filartiga* and *Tel-Oren*, he concurred with the dismissal of the complaint.<sup>137</sup> In *Tel-Oren*, the actors (the terrorists) were non-state parties.<sup>138</sup> While he found it clear that international law forbids torture by state actors, such as Pena (a Paraguayan police captain), Judge Edwards found insufficient consensus that non-state actors, such as the PLO, are subject to the same rules.<sup>139</sup>

Finally, Judge Robb, in his concurring opinion, agreed with the dismissal on the basis of the constitutional political question doctrine.<sup>140</sup> Judge Robb found the case judicially unmanageable, both politically and practically.<sup>141</sup> Therefore, until the subject of human rights is entrusted to the judiciary by Congress and the President, Judge Robb found that it was not a justiciable issue for the courts.<sup>142</sup>

## B. *Expropriation*

### 1. *Introduction*

The most recent tentative draft of the *Restatement (Revised) of Foreign Relations* provides that a state is responsible under international law for a wrongful taking of the property of a national of another state.<sup>143</sup> This

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States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

*Id.* at 817 (quoting L. OPPENHEIM, *supra* note 9, at 19) (Bork, J., concurring). Judge Bork found that even though international law is increasingly concerned with individual rights, "human rights" are a vague ideal rather than a legal obligation. *Id.* at 818 (Bork, J., concurring).

135. *Id.* at 820 (Bork, J., concurring).

136. *Id.* at 775 (Edwards, J., concurring).

137. *Id.* (Edwards, J., concurring).

138. *Id.* at 776 (Edwards, J., concurring).

139. *Id.* at 791-96 (Edwards, J., concurring).

140. *See id.* at 823 (Robb, J., concurring). Judge Robb did not reach the jurisdictional issues discussed by Judges Bork and Edwards.

141. *Id.* at 823-24, 26 (Robb, J., concurring).

142. *Id.* at 825-26 (Robb, J., concurring).

143. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (Tent. Draft No. 7) (1986) [hereinafter RESTATEMENT (No. 7)]. This section provides:

§ 712. Economic Injury to Nationals of Other States

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that is (a) not for a public purpose, or (b) discriminatory, or

(c) not accompanied by provision for just compensation; for compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken, be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and be in a form economically usable by the foreign national;

(2) a repudiation or breach by the state of a contract with a national of another state (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by non-commercial considerations and compensatory damages are not paid; or (b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;

(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

*Id.* § 712; *see also* *Factory at Chozrow (Merits)*, 1926-29 P.C.I.J. (ser. A) Nos. 7, 9, 17, 19. This complex case made several appearances before the court and is summarized, based upon the statement of the court in Nos. 9 and 17, in H. STEINER & D. VAGTS, *supra* note 10, at 483-87. In this famous case, in 1915, the German Reich entered into a contract with Bayerische Strickstoffwerke A.G. (Bayerische) under which Bayerische would establish and manage for the Reich a nitrate factory at Chozrow, in (then German) Upper Silesia. H. STEINER & D. VAGTS, *supra* note 10, at 483. The German government owned the land. *Id.* In 1919, another company, Oberschlesische Stickstoffwerke A.G. (Oberschlesische) bought the factory, but it remained under the management of Bayerische. *Id.* at 483-84. Stickstoff Treuhand G.m.b.H. (Treuhand) was also formed in 1919 which became the sole shareholder of Oberschlesische and assumed the obligations of Oberschlesische for payment for the factory. *Id.* at 484.

Pursuant to the Treaty of Versailles in 1919, Germany ceded various territories to Poland, but left for subsequent determination the status of certain territories in Upper Silesia, including the Chozrow nitrate factory. *Id.* The Treaty of Versailles provided that countries could take the property of the German government located on ceded German territory. *Id.*

In 1922, Germany and Poland entered into the Geneva Convention which was intended to carry out the terms of the Treaty of Versailles and which also ceded Upper Silesia to Poland. *Id.* Head III of the Convention gave Poland the right to expropriate certain property of German nationals located in Upper Silesia. *Id.* Later, a Polish court, relying on the Treaty of Versailles and certain Polish domestic law decreed that the Polish treasury was to own the Chozrow factory. *Id.* Germany sued in the Polish courts, went before an arbitral tribunal and finally before the Permanent Court of International Justice (P.C.I.J.). *Id.*

The P.C.I.J. decreed that Oberschlesische owned the factory and concluded that "contractual rights of Bayerische to manage the factory had also been expropriated." *Id.* The Treaty and Convention, when taken together, rendered Poland's taking of the factory unlawful. *Id.* at 484-85. The Court stated:

Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exemption, it is permissible to conclude that no further derogation is allowed. . . .

*It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention.*

*Id.* at 485 (quoting *Chozrow Factory* 1926-29 P.C.I.J. (ser. A) No. 7, at 22) (em-

rule reflects the prevailing western view.<sup>144</sup> To satisfy minimum standards of international law, the taking must be for a public purpose and must be accompanied by just compensation.<sup>145</sup> According to this view of international law, the compensation must be "prompt, adequate and effective."<sup>146</sup>

The western view of the status of international law regarding expropriations is opposed by both communist countries and by the developing countries of the Third World.<sup>147</sup> The Soviets assert that "an alien enters the territory of another state or acquires property there subject wholly to local law"<sup>148</sup> and communist countries generally "believe that states may expropriate the means of production, distribution and exchange without paying compensation."<sup>149</sup> The developing world, representing the majority of states, views expropriation as a means that a state may employ to serve the goal of economic self-determination.<sup>150</sup>

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phasis added). This quote is at the essence of what commentators believe was a recognition of general rule of international law against expropriation without fair compensation. See *id.* at 488 ("Commentators and codifiers . . . have built a vast jurisprudential edifice upon the Chozrow Factory Case. . . . [T]he case contains the statements of the World Court that are most directly related to expropriation.").

144. See M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 91 (5th ed. 1984).

145. See RESTATEMENT (No. 7), *supra* note 143, § 712(1).

146. M. AKEHURST, *supra* note 144, at 91-92 (footnote omitted). "Prompt, adequate, and effective compensation" are terms of art under international law established in a famous exchange of diplomatic notes between Secretary of State Hull and the Mexican Ambassador. See H. STEINER & D. VAGTS, *supra* note 10, at 488-92 (quoting 3 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 655-61 (1942)). Between 1915 and 1940, the Mexican government expropriated agrarian and oil properties owned directly or indirectly by United States citizens. *Id.* at 488. In a note dated August 28, 1938, Secretary of State Hull made the following classic statement of international law regarding compensation for expropriation:

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, *without provision for prompt, adequate, and effective payment therefor*. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations.

*Id.* at 491 (quoting Letter from Secretary of State Hull to Mexican government (Aug. 22, 1938)) (emphasis added).

147. M. AKEHURST, *supra* note 144, at 92.

148. RESTATEMENT (No. 7), *supra* note 143, § 712 reporters' notes 1.

149. M. AKEHURST, *supra* note 144, at 92.

150. *Id.* Professor Akehurst stated:

The developing countries hold the balance between the Western countries and the communist countries. Most of them could gain a large short-term benefit by expropriating foreign-owned property without compensation, but in the long term they would lose by doing so,

Western states, and the United States in particular, have not modified the traditional view of the international law of compensation. The United States has concluded a number of treaties involving foreign trade and investment under which foreign states have agreed to the western standard of compensation in the event of expropriation.<sup>151</sup>

## 2. Case Law

A court asked to determine an expropriation claim must first determine whether a confiscatory taking has occurred in violation of international law. In *West v. Multibanco Comermex, S.A.*,<sup>152</sup> for example, the court provided an analysis of whether institution of exchange controls by the Mexican government constituted a taking. In this appeal of consolidated cases, plaintiffs were United States investors in certificates of deposit issued by Mexican banks.<sup>153</sup> At the time plaintiffs purchased the certificates, the issuing banks were privately owned.<sup>154</sup> In 1982, as the

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because they would attract no private investments in the future (or, alternatively, they would have to pay a much higher price for private investments, in order to compensate for political risks). Developing countries with left-wing regimes tend to support the communist attitude towards the legality of expropriation. Other developing countries often enter into *treaties* for the protection of investments . . . in order to attract further foreign investment; but they show an increasing reluctance to accept the Western view of *customary* international law about expropriation.

*Id.* (emphasis in original).

Resolutions which the United Nations General Assembly has passed reflect the shift of the Third World to the majority position. In 1974, the General Assembly passed the Charter of Economic Rights and Duties of States. G.A. res. 3281, 29 U.N. Supp. (No. 31) at 50, U.N. Doc. A/RES/3281 (1974), *reprinted in* 14 INT'L LEGAL MATERIALS 251 (1975) (subsequent citations to this reprinting). Article 2(c) of the Charter provides that each state has the right:

(c) *To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*

14 INT'L LEGAL MATERIALS at 254-55 (emphasis added). Although this resolution provides that "appropriate compensation" shall be paid, it allows the expropriating state to determine what constitutes appropriate compensation according to its own laws. Compensation is, therefore, generally likely to be low. See M. AKEHURST, *supra* note 144, at 93.

151. See RESTATEMENT (No. 7), *supra* note 143, § 712 reporters' note 1.

152. 807 F.2d 820 (9th Cir. 1987).

153. *Id.* at 822. Plaintiffs had purchased both peso and dollar denominated certificates. *Id.* Since 1979, plaintiffs had responded to solicitations from Mexican banks urging American investors to purchase Mexican certificates. *Id.* The certificates promised high yields. *Id.*

154. *Id.*



price of world oil fell significantly, Mexico faced an enormous depletion of its foreign currency reserves resulting ultimately in the Mexican government nationalizing its entire private banking system.<sup>155</sup> Additionally, the Mexican government enacted a number of controls regarding foreign currency exchange rates, including a decree that all certificates of deposit were to be paid in pesos at a rate specified by the Mexican government.<sup>156</sup> As a result of the mandated exchange rate<sup>157</sup> and the declining value of the peso, upon maturity of their certificates, plaintiffs received dollars worth substantially less than the face amount of their certificates.<sup>158</sup>

The District Court for the Northern District of California granted summary judgment in favor of defendant Mexican banks.<sup>159</sup> Plaintiffs on appeal alleged, *inter alia*, that the exchange controls amounted to a taking in violation of international law.<sup>160</sup> Initially, the court concluded that it was not precluded by the act of state doctrine from judging the validity of the exchange control regulations.<sup>161</sup> The court also prefaced its analysis with a finding that international law was the correct choice of law; the court stated that in ascertaining the content of international law, it could look to various sources of law, including United States law.<sup>162</sup>

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155. *Id.* at 822-23.

156. *Id.*

157. *Id.* at 823. The Mexican central bank mandated an exchange ratio of 70 pesos to the dollar, while the actual prevailing exchange rate was 112 pesos to the dollar. *Id.* The resulting loss to investors was approximately one-third of the principal. *Id.*

158. *Id.*

159. *Id.* at 822.

160. *Id.* at 823. Plaintiffs also claimed that the Mexican banks had violated federal securities laws. *Id.* at 826-29. Specifically, plaintiffs claimed that the certificates were "securities" within the meaning of 15 U.S.C. § 78c(a)(10). The court reasoned that certificates of deposit are normally not "securities" within the meaning of the federal securities laws based on the "insolvency protection test." *Id.* at 826-27 (citing *Marine Bank v. Weaver*, 455 U.S. 551, 558 (1982)). According to this test, where an instrument such as a certificate of deposit is "abundantly protected" against the risk that a bank would become insolvent through a scheme of regulation, those financial instruments will not be deemed securities which require the protection of federal securities laws. *Id.* at 826 (citing *Weaver*, 455 U.S. at 559).

The court noted, however, that it would also be required under United States law to determine whether the Mexican officials in enacting and carrying out the exchange control laws violated Mexico's regulatory structure so that the scheme of regulation, as applied, did not meet the insolvency test. *Id.* at 827. Based on the act of state doctrine, the court did not undertake this analysis, reasoning that "[t]he evaluation by one sovereign of foreign officers' compliance with their own laws would, at least in the absence of the foreign sovereign's consent, intrude upon the state's coequal status." *Id.* at 828 (citation omitted).

161. For a discussion of the act of state doctrine, see *supra* notes 44-51 and accompanying text.

162. *West*, 807 F.2d at 831 n.10. The court concluded that "the rights arising from a certificate of deposit are 'rights to property' capable of being expropriated . . . under international law." *Id.* at 830.

In holding that the Mexican imposition of exchange controls did not constitute a taking violative of international law, the court relied on scholarly writings on the subject,<sup>163</sup> United States case law,<sup>164</sup> writings by the Director of the Legal Department of the International Monetary Fund,<sup>165</sup> the *Restatement of Foreign Relations*,<sup>166</sup> decisions of the Foreign Claims Settlement Commission<sup>167</sup> and writings by the Secretary of State.<sup>168</sup>

The above authorities led the court to conclude that customary international law provides every state with "the right . . . to stabilize its currency in time of financial stress."<sup>169</sup> A state's right to impose exchange controls, the court reasoned, is limited by a rule of international law requiring that a state imposing exchange controls not discriminate against foreign investors.<sup>170</sup> Here, however, the court found that Mexico had not discriminated against foreign investors.<sup>171</sup> Finally, the court stated, in dicta, that international law requires that "appropriate" compensation be paid for expropriated property.<sup>172</sup> Having concluded that no taking occurred, the court did not further discuss the requirements of compensation under international law.<sup>173</sup>

In *Banco Nacional de Cuba v. Chase Manhattan Bank*,<sup>174</sup> a case arising out of the Cuban revolution, the United States Court of Appeals for the Second Circuit addressed the norms for compensation under international law.<sup>175</sup> In 1960, the Republic of Cuba nationalized four Cuban branches of Chase Manhattan Bank.<sup>176</sup> The plaintiff in this case was Banco Nacional de Cuba (Banco Nacional), the central bank of Cuba.<sup>177</sup> After the revolution, Cuban law designated Banco Nacional to take over

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163. *See id.* at 831-32 (for example, court relied on "leading expert" F.A. Mann and his work, *The Legal Aspect of Money*).

164. *See id.* at 831-32 & n.11 (court relied on federal and state court decisions).

165. *See id.* at 832.

166. *See id.*

167. *See id.*

168. *See id.* at 832-33.

169. *Id.* at 832 (quoting *In the Matter of Karolin Furst*, No. CZ-14, Fourteenth Semiannual Report 116, 117).

170. *Id.* (citing Christie, *What Constitutes a Taking Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 332 (1964)).

171. *Id.* at 832.

172. *Id.* at 832-33 (citations omitted).

173. *Id.* at 833. For a discussion of the requirements of compensation under international law, see *supra* note 146 and accompanying text. For a discussion of the analysis provided by a United States court regarding international compensation norms, see *infra* notes 175-94 and accompanying text.

174. 658 F.2d 875 (2d Cir. 1981).

175. *See id.* at 877.

176. *Id.* at 878.

177. *Id.* at 879.

the assets and business of the Chase branches.<sup>178</sup> Banco Nacional commenced an action in a United States court asserting claims against Chase.<sup>179</sup>

Chase asserted four counterclaims, one of which was based on international law.<sup>180</sup> Chase argued that the expropriation of its four Cuban branches was in violation of international law and sought full recovery from Banco Nacional "as the alter ego of the Cuban government."<sup>181</sup> At trial, the court found, *inter alia*, that it was a "foreclosed issue that the taking of Citibank's Cuban branches by the Government of Cuba was in violation of international law."<sup>182</sup> On appeal of this issue, Banco Nacional argued that the act of state doctrine would bar Chase's counterclaim.<sup>183</sup> The Second Circuit rejected this argument and affirmed the trial court's opinion that the taking was in violation of international law.<sup>184</sup>

178. *Id.*

179. *Id.* First, Banco Nacional sought over \$7 million representing the surplus proceeds that Chase held from the sale of collateral securing a loan to a certain Cuban banking enterprise. *Id.* Second, Banco Nacional sought to recover over \$2.5 million it had on deposit with Chase. *Id.* Chase had applied these monies against obligations which allegedly the Cuban government or instrumentalities owed it. *Id.*

180. *Id.* Chase alleged that Cuba had converted over \$18 million of its property in violation of international law. *Id.*

181. *Id.*

182. 505 F. Supp. 412, 429 (S.D.N.Y. 1980). The trial court gave the following reasons for finding that the taking was plainly done in violation of international law:

(a) Cuba failed to provide compensation for the taking; (b) the taking was a retaliatory measure against the United States citizens because of their Government's actions with respect to the Cuban sugar quota; and (c) the taking discriminated against American nationals in that Cuba owned, as well as Canadian and French private banks were not acquired . . . until much later.

*Id.* The court also quoted the following observation by Professor Lillich: "The Cuban nationalizations 'based upon a totally illusory funding system and payable in bonds that were never printed' so patently violated international law that serious analysis was unnecessary." *Id.* at 430-31 (quoting 2 R. LILICH, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 121 n.6 (1973)).

183. *Banco Nacional*, 658 F.2d at 880. For a discussion of the act of state doctrine, see *supra* notes 44-51 and accompanying text.

184. See *Banco Nacional*, 658 F.2d at 884-85. The precise holding of the case constitutes rather narrow grounds for rejecting the application of the act of state doctrine. The court rejected application of the doctrine based on three factors which together comprised a "phenomenological rule." *Id.* at 884. First, the court emphasized that the Executive Branch had filed a *Bernstein* letter advising the court that the act of state doctrine need not be applied. *Id.* For a discussion of the *Bernstein* exception to the act of state doctrine, see *supra* notes 57-61 and accompanying text. Second, the court found that "there [was] no showing that an adjudication of the claim [would] interfere with delicate foreign relations." *Banco Nacional*, 658 F.2d at 884. Third, the court found that "the claim against the foreign sovereign [was] asserted by way of [a] counterclaim and [did] not exceed the value of the sovereign's claim." *Id.* Finding these three factors pres-

Next, the court addressed the question of Chase's damages for this taking.<sup>185</sup> The court first noted that it was obligated to apply international law to determine the appropriate compensation owing to Chase for the expropriation of its Cuban branches.<sup>186</sup> Notwithstanding the confusion and lack of consensus among nations regarding norms of compensation, the court found that under international law only two norms could apply to the case at bar: Cuba could pay either "appropriate" compensation or "full" compensation.<sup>187</sup> Under either of these two norms, it was likely that Chase would receive the same amount of compensation.<sup>188</sup>

In addition, the court rejected the argument that international law would allow an expropriating state to pay either no compensation or partial compensation.<sup>189</sup> Rejecting Banco Nacional's argument that partial compensation would be appropriate because, historically, settlement of expropriated claims results in payment of 40-60% of the value of the claim,<sup>190</sup> the court noted that such settlements reflect parties' compromises and not norms of international law.<sup>191</sup>

Although the court conceded that the victim of an expropriation will not be entitled under customary international law to "full" compensation in all circumstances,<sup>192</sup> it concluded that a norm of "appropriate" compensation may amount to "full" compensation in some cases.<sup>193</sup> Here, the court determined that payment for the net asset value of the expropriated branches represented both "appropriate" and "full" compensation.<sup>194</sup>

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ent, the court held that Chase's counterclaim was not barred by the act of state doctrine. *Id.* at 884-85.

185. *Banco Nacional*, 658 F.2d at 887-88. The court described the "orthodox position" long held by the United States that compensation must be "prompt, adequate, and effective." *Id.* at 888 (citing Dawson & Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 *FORDHAM L. REV.* 727, 733 (1962)). Reviewing the standards espoused by developing South American and communist countries regarding compensation, as evidenced in resolutions adopted by the United Nations General Assembly, the court found "at best a confused and confusing picture as to what the consensus may be as to the responsibilities of an expropriating nation to pay 'appropriate compensation.'" *Id.* at 891.

186. *Id.* at 891.

187. *Id.*

188. *Id.* at 891-92.

189. *Id.* at 892.

190. *Id.*

191. *Id.* The court stated: "We are concerned with the parties' rights and duties, and we do not believe that international law as to compensation is merely descriptive of their conciliatory actions." *Id.*

192. *Id.*

193. *Id.* at 892 & n.22.

194. *Id.* at 892-93. The court rejected Chase's contention that it was entitled to a premium from the Cuban government representing the "going concern value" of the expropriated branches. *Id.* at 893-94. The court defined "going

C. *Extraterritoriality*1. *Introduction*

Under international law, a state may not "prescribe laws with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable."<sup>195</sup> Generally, a state may exercise jurisdiction to prescribe laws with respect to conduct which takes place within, or is intended to have an effect within, its territory, or to persons, interests or things within its territory.<sup>196</sup> A state also has jurisdiction to prescribe laws with respect to its nationals, wherever they are located

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concern value" as "the proposition that [a] prospective buyer of a business will be willing to pay a premium over the book value of the assets in the expectation that the earnings of the business will continue and that the new owner will receive that stream of earnings." *Id.* at 893. Because of the detrimental economic effects of the Cuban revolution, the court regarded the prospects of Chase's Cuban branches for future earnings as "highly speculative." *Id.* at 893-94. As a result, the court concluded that future earnings were an inappropriate basis for an award of damages. *Id.* at 894.

195. RESTATEMENT (No. 7), *supra* note 143, § 403. In determining whether the exercise of jurisdiction is unreasonable, § 403(2) outlines the following as factors to be evaluated where appropriate:

- (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of the regulation in question to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by other states.

*Id.*

196. RESTATEMENT (No. 6), *supra* note 7, § 402(1). This section provides:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct a substantial part of which takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory which has or is intended to have substantial effect within its territory . . . .

*Id.*

and with respect to activity directed against state security.<sup>197</sup> Customary international law mandates the limitations on a state's prescriptive jurisdiction.<sup>198</sup>

## 2. Case Law

Two cases involving the extraterritorial reach of United States anti-trust legislation provide examples of the two leading approaches that courts take when considering the limits of jurisdiction to prescribe laws imposed by customary international law.<sup>199</sup> The opinion in *Timberlane Lumber Co. v. Bank of America*,<sup>200</sup> parallels the rules of international law set forth above. In that case, the United States Court of Appeals for the Ninth Circuit examined United States antitrust laws as applied to foreign conduct of mostly foreign nationals.<sup>201</sup> Plaintiff Timberlane, an Oregon partnership which engaged in lumber importing, owned two Honduran corporations which were in the business of purchasing and milling Hon-

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197. *Id.* § 402(2)-(3). These sections provide: "(2) the activities, status, interests or relations of its nationals outside as well as within its territory; or (3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests." *Id.*

198. RESTATEMENT (No. 7), *supra* note 143, § 403 comment a. This draft of the *Restatement* emphasizes that limitations on prescriptive jurisdiction arise out of obligations of customary international law. In a comment to this section, the reporters observe that the "reasonableness" limitation has often been said to be based on "comity." *See id.* Comity is defined by the Supreme Court in the seminal case *Hilton v. Guyot*, as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." 159 U.S. 113, 163-64 (1895). In contrast to customary international law, comity is not "a matter of absolute obligation." *See id.*; *see also* *Remington Rand Corp.-Del. v. Business Sys., Inc.*, 830 F.2d 1260 (3d Cir. 1987) (recent analysis of the doctrine of comity in case testing effect of Dutch bankruptcy order on related litigation in United States). While comity is more than merely a courtesy which a nation may extend, it does not rest on *opinio juris sive necessitatis*—the compulsion of law. *See Remington Rand*, 830 F.2d at 1267. For a discussion of *opinio juris* and customary international law, *see supra* notes 11-12 and accompanying text.

The reporters of the *Restatement* indicate that the reasonableness limitation of prescriptive jurisdiction is "not merely . . . a matter of discretion," but instead is an obligation which arises "regardless of the state of relations between the state exercising jurisdiction and another state whose interests may be affected." RESTATEMENT (No. 7), *supra* note 143, § 403 comment a.

199. It has been observed that "[t]he situations where the issue of extraterritoriality arises cover a broad spectrum." Gustafson, *Introduction: Conference on Extraterritoriality for the Businessman and the Practicing Lawyer*, 15 LAW & POL'Y INT'L BUS. 1095 (symposium addressing extraterritorial aspects of antitrust laws, antiboycott provisions, Foreign Corrupt Practices Act, and various trade laws); *see also* Note, *Extraterritoriality: Current Policy of the United States*, 19 SYRACUSE J. INT'L L. & COM. 493 (1986).

200. 549 F.2d 597 (9th Cir. 1976).

201. *See id.* at 604-05.

duran timber.<sup>202</sup> The primary defendant, the Bank of America, operated a branch office in Honduras.<sup>203</sup>

In response to the antitrust suit that Timberlane brought in the United States against the Bank, the Bank argued that antitrust laws could not apply with respect to activities in a foreign country.<sup>204</sup> At trial, Timberlane's antitrust suit was dismissed, primarily on the basis of the act of state doctrine.<sup>205</sup>

On appeal, the Ninth Circuit found that the Honduran government was not directly involved with the activity underlying the antitrust claim and thus, dismissed the act of state defense.<sup>206</sup> The court then analyzed the extraterritorial reach of United States antitrust laws, adopting a "tri-partite analysis." Under international law, a domestic law may have ex-

202. *Id.* at 603.

203. *Id.* Defendant Bank had a significant financial interest in two Honduran lumber mills. *Id.* at 604. A third mill, operated by the Lena family, was indebted to the Bank and was otherwise in financial trouble. *Id.* at 604-05. Timberlane alleged that the Bank entered into a conspiracy with the Lena enterprise to join with two other Honduran mills to disrupt Timberlane's efforts. *Id.* at 604. This conspiracy allegedly resulted in Honduran court proceedings and embargoes against Timberlane's Honduran subsidiaries and the arrest and imprisonment of Timberlane's Honduran manager. *Id.* at 604-05.

204. *Id.* at 601.

205. *Id.* For a discussion of the act of state doctrine, see *supra* notes 44-51 and accompanying text.

206. *Timberlane*, 549 F.2d at 605-08. The appellate court criticized the trial court's reliance on *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). In *Occidental*, the plaintiff sued for violation of the antitrust laws claiming that defendants had conspired in "inducing and procuring" assorted executive acts by foreign states" to disrupt the plaintiff's oil concessions in the Persian Gulf. See *Occidental*, 331 F. Supp. at 95, 107. The court found that the act of state doctrine barred plaintiff's claim because its complaint directly implicated foreign acts of sovereign states. *Id.* at 111. Specifically, the court found that under the act of state doctrine, it could not question the acts of certain Persian Gulf states in claiming ownership of "the oil-rich portion of plaintiffs' concession." See *id.* at 100, 107-13.

In *Timberlane*, the Ninth Circuit distinguished *Occidental Petroleum Corp.*, finding:

Unlike the *Occidental Petroleum* plaintiffs . . . , Timberlane does not seek to name Honduras or any Honduran officer as a defendant or co-conspirator, nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. In fact, there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained. . . . Moreover, plaintiffs here apparently complain of additional agreements and actions which are totally unrelated to the Honduran government. These separate activities would clearly be unprotected even if procurement of a Honduran act of state were one part of defendants' overall scheme. . . .

Under these circumstances, it is clear that the "act of state" doctrine does not require dismissal of the Timberlane action.

549 F.2d at 608 (citations omitted).

traterritorial reach if there is: 1) some effect on American commerce; 2) a "cognizable injury" to the plaintiffs created by the effect and 3) a showing that United States' interests in extending the reach of the law outweigh the interests of the other nation in applying its law.<sup>207</sup>

The court set forth several factors for consideration in balancing the interests of the foreign state against those of the United States: 1) the "degree" of potential conflict with foreign law; 2) the nationality or allegiance of the parties; 3) the location of the businesses involved; 4) the ability of the United States to enforce compliance with its laws; 5) the significance of the effects in the United States as compared with the significance of the effects elsewhere; 6) the intent to produce foreseeable harmful effects in the United States and 7) the relative importance of domestic violations versus violations occurring abroad.<sup>208</sup> Applying this analysis, the court found that the activities of which *Timberlane* complained produced an effect in the United States injuring United States commerce.<sup>209</sup> Furthermore, because the court found that at trial there had not been "any comprehensive analysis of the relative connections and interests of Honduras and the United States,"<sup>210</sup> the court remanded the action.<sup>211</sup>

In direct contrast to *Timberlane*, the United States Court of Appeals for the District of Columbia rejected the balancing of interests analysis in *Laker v. Sabena Belgian World Airways*.<sup>212</sup> In this case, the British firm Laker offered transatlantic flight fares at a lower rate than airlines belonging to the International Air Transport Association (IATA).<sup>213</sup> When Laker's competitors in the IATA effected price cuts, Laker was eventually forced into liquidation.<sup>214</sup> Laker filed an antitrust suit in a United States federal court against domestic and foreign airlines.<sup>215</sup> The foreign airlines filed suit in the United Kingdom seeking to enjoin Laker from proceeding with its United States antitrust action against them.<sup>216</sup> The United Kingdom High Court of Justice granted an interim

207. *Timberlane*, 549 F.2d at 613.

208. *Id.*; cf. RESTATEMENT (No. 7), *supra* note 143, § 403(2). For the text of § 403(2), see *supra* note 195.

209. *Timberlane*, 549 F.2d at 614-15 & n.31.

210. *Id.* at 615. The *Timberlane* court found "that the complained of activities were intended to, and did, affect . . . the flow of United States foreign commerce." *Id.*

211. *Id.*

212. 731 F.2d 909 (D.C. Cir. 1984).

213. *Id.* at 916-17. Laker then had a rising demand for its flights and purchased new planes from McDonnell-Douglas, a United States corporation. *Id.* Laker's earnings were mainly in British pounds and when the exchange rate dropped in 1981, Laker met with serious problems in fulfilling its obligations to pay McDonnell-Douglas in U.S. dollars. *Id.*

214. *Id.* at 918.

215. *Id.* at 915.

216. *Id.*



injunction.<sup>217</sup> The United Kingdom Court of Appeal thereafter granted a permanent injunction and ordered Laker to dismiss its suit against the British airlines.<sup>218</sup> Laker then filed for injunctive relief in the United States against certain United States airlines and several additional foreign airlines. In a second suit, Laker sought to prevent the additional foreign defendants from also obtaining a British injunction compelling Laker to dismiss its United States suit.<sup>219</sup> The district court granted the preliminary injunction and the United States Court of Appeals for the District of Columbia affirmed.<sup>220</sup>

The appellate court found that, while both Britain and the United States had jurisdiction, there was no reason why the United States could not exercise its concurrent jurisdiction.<sup>221</sup> After considering whether it should weigh the interests of the United States against the interests of Great Britain before exercising its concurrent jurisdiction,<sup>222</sup> the court concluded that "[a]bsent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction."<sup>223</sup> Because the Executive Branch had not provided guidance to the contrary, the court held that Laker could continue its antitrust suit for damages in the United States.<sup>224</sup>

### III. ANALYSIS

The case law discussed demonstrates the uncertainty with which domestic courts approach questions of customary international law. In *Filartiga*, the Second Circuit held that a violation by a state of an international norm prohibiting torture gives rise to compensable claims in United States courts when jurisdiction is established under the Alien Tort Statute.<sup>225</sup> In *Tel-Oren*, while the court did not refute the existence of an international norm prohibiting torture by a state actor, the court produced three theories for dismissing a claim essentially similar to the

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 915-16.

221. *See id.* at 948-53.

222. *See id.* at 955.

223. *Id.* at 955 (footnotes omitted). The court added:

In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdictions.

*Id.* (footnotes omitted).

224. *Id.*

225. *Filartiga*, 630 F.2d at 880. For a discussion of the *Filartiga* case and the Alien Tort Statute, see *supra* notes 100-19 and accompanying text.

claim in *Filartiga*.<sup>226</sup> *West*<sup>227</sup> and *Banco Nacional de Cuba*<sup>228</sup> establish that a court confronted with an expropriation claim faces the dual task of determining whether a taking has occurred in violation of international law and if so, the compensation required to be paid under international law. In the latter case, the court could not definitively set forth whether international law required “full” or “appropriate” compensation.<sup>229</sup> *Timberlane*<sup>230</sup> and *Laker*<sup>231</sup> demonstrate divergent views of proper norms for extending the extraterritorial reach of United States laws. The debate centers on whether, as a matter of customary international law, courts should engage in interest balancing to determine the limits of United States jurisdictional authority.<sup>232</sup>

Uncertainty in United States case law may support two related arguments: 1) customary international law lacks legitimacy as establishing binding rules of conduct and 2) domestic courts are ill-equipped to ascertain and apply norms of customary international law.

With respect to the former argument, Professor Trimble has stated:

Evolving norms of customary international law do not receive the scrutiny that a proposed statute or treaty would receive within the executive branch, within Congress, or among concerned members of the American public. Denied this process, these norms are not supported by the mythology of popular consent that a law or ratified treaty acquires. Because a

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226. 726 F.2d 774. For a discussion of *Tel-Oren*, see *supra* notes 120-42 and accompanying text. Judge Bork found that an individual must demonstrate an express grant of a private cause of action before one could invoke jurisdiction under the Alien Torts Statute. *Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring). For a discussion of Judge Bork's opinion, see *supra* notes 125-35 and accompanying text. Judge Edwards held the evidence insufficient to establish a norm prohibiting terrorism or non-official torture. *Tel-Oren*, 726 F.2d at 775-98 (Edwards, J., concurring). For a discussion of Judge Edwards's opinion, see *supra* notes 136-39 and accompanying text. Judge Robb found the human rights question to be a non-justiciable political question. *Tel-Oren*, 726 F.2d at 823-27 (Robb, J., concurring). For a discussion of Judge Robb's opinion, see *supra* notes 140-42 and accompanying text.

227. 807 F.2d 820. For a discussion of *West*, see *supra* notes 152-73 and accompanying text.

228. 658 F.2d 875. For a discussion of *Banco Nacional de Cuba*, see *supra* notes 174-94 and accompanying text.

229. *Banco Nacional*, 658 F.2d at 892-93.

230. 549 F.2d 597. For a discussion of *Timberlane*, see *supra* notes 200-13 and accompanying text.

231. 731 F.2d 909. For a discussion of *Laker*, see *supra* notes 212-24 and accompanying text.

232. See Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 41 N.W. J. INT'L L. & BUS. 130, 164-66 (1982) (courts should not employ interest balancing because it requires courts to make political determinations); see also Maier, *Interest Balancing and Extraterritorial Jurisdictions*, 31 AMER. J. COMP. L. 579, 592-96 (1983) (decisionmakers in diplomatic forum better able to balance interest than court).

customary norm has a much weaker political foundation than a treaty, it should not be treated as equally authoritative.<sup>233</sup>

One response to this observation is that customary international law may be evidenced by statute or treaty.<sup>234</sup> Thus, in finding a norm prohibiting torture in *Filartiga*, the United States Court of Appeals for the Second Circuit relied in part upon the existence of numerous treaties proscribing state torture.<sup>235</sup> Similarly, courts may look to the domestic laws of the United States and other states as evidence of a norm.<sup>236</sup> Again, *Filartiga* provides an example; the court relied on a finding that "torture is prohibited, [either] expressly or implicitly, by the constitutions of over fifty-five nations, including . . . the United States."<sup>237</sup> The existence of treaties and widespread domestic law regarding a subject of customary international law is not prerequisite or necessarily sufficient evidence of the existence of a binding norm.<sup>238</sup> Where such evidence is relevant, however, the customary norm is indirectly subject to the same political process and scrutiny in its formation

233. Trimble, *supra* note 1, at 730. Customary international law lacks legitimacy according to Professor Trimble for several additional reasons. First, customary law does not comport with American political tradition that "[t]he authority of law-making institutions [rests] on the consent of the governed." *Id.* at 719. Because a binding law of custom may arise through practice "wholly outside the United States it has no basis in popular sovereignty at all." *Id.* at 721. The "law of nations," referred to in the Constitution and incorporated into the common law, does not provide a historical basis for modern customary international law. *Id.* at 723 (citing U.S. CONST. art. I, § 8, cl. 10). Rather, the law of nations "referred primarily to the law merchant and maritime law." *Id.* Finally, customary international law, unlike constitutional law, cannot be employed to overturn violative actions by the political branches because it is not regularly relied upon as a basis for political discourse. *Id.* at 726.

234. For a further discussion of a treaty or statute as evidence of customary international law, see *supra* note 64 and accompanying text. See also Note, *The Application of International Human Rights in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207, 227-30 (1982) (cataloguing use by domestic courts of treaties in ascertaining customary norms of human rights).

235. See 630 F.2d at 882-84.

236. For a discussion of evidence of customary international law norms, see *supra* note 78 and accompanying text.

237. *Filartiga*, 630 F.2d at 884 & note 13 (citing U.S. CONST., amends. VIII, XIV) (footnotes omitted).

238. See B. JANKOVIC, *supra* note 15, at 16. The author stated:

Usage is not the same as international custom. . . . Usage [is an international practice] used in the intercourse of countries with no sense of obligation, since the parties do not wish to bind themselves with a mandatory rule but prefer to consider the relationship temporarily regulated. This means that the application of rules of usage is an attempt to regulate the interests of two or more parties. Of course, usage . . . can after long use prove acceptable to the interested sides and in this way become transformed into international custom, or they may just as easily be abolished unilaterally.

*Id.*

as the treaties and domestic laws evidencing it. It is true that the formation of treaties in the United States rests in part on a domestic political process,<sup>239</sup> while in contrast, customary law is based on consistent practice by states so that a binding norm could be created wholly based on the practice of foreign nations.<sup>240</sup> A state is not bound by a principle, however, "if it rejected that principle during the process of its development."<sup>241</sup> Customary norms do not bind a state that persistently objects to their existence.<sup>242</sup>

Further, customary norms, which are important to both the United States and to the international community may be vitiated where a court fails to apply a customary norm in an appropriate case.<sup>243</sup> Treaty law has not been enacted to regulate many critical areas of international conduct.<sup>244</sup> Rather than viewing itself as ill-equipped to determine and

239. See Trimble, *supra* note 1, at 727-29. Professor Trimble observed: The norm of a self-executing treaty has been approved twice by the President (upon submission to the Senate and upon ratification) and by at least two-thirds of the Senate. It has thus passed some formidable political hurdles with all the potential attendant publicity and consensus building entailed by the process. . . . If the subject matter of the negotiation affects constituencies outside the State Department, such as labor, trade, or agriculture, the concurrence of the relevant departments must be obtained.

. . . .  
In the process, political compromises can be made. The new rule is not only in fact likely to have received explicit assent through a widely recognized law-making process, but it also carries whatever symbolism of legitimacy follows its emergence from the political process.

*Id.* at 728-29 (footnotes omitted).

240. *Id.* at 729. It is argued that "[i]n the most extreme case, a rule could evolve out of the practice of foreign nations while remaining entirely unknown to all or most of the United States." *Id.*

241. Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556 & n.38 (1982).

242. See Colson, *How Persistent Must the Persistent Objector Be?* 61 WASH. L. REV. 957, 969 (1986). The author discussed the situation in which a principle is promoted as being universally applicable and is supported by a majority of states. *Id.* at 965. A state which seeks not to be bound by the principle may object; the level of objection, it is suggested, must be commensurate with the intensity with which the practice is undertaken and claimed as binding. *Id.* at 967. The author states "where activity is intense, structured, clear, and vocal, the persistent objector must continually make its position known to ensure that the law does not find tacit consent through a relatively short period of silence." *Id.*

243. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12 & n.17 (1970) (domestic courts "often 'must be relied upon to perform the international function of upholding rights and duties grounded in international law'" (quoting L. ERADES & W. GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES* 22 (1961)); cf. Trimble, *supra* note 1, at 672 (courts' "application of customary international law in a manner independent of the political branches can only stifle appropriate developments of the law").

244. See H. STEINER & D. VAGTS, *supra* note 10, at 360. These authors point out that treaties have not been effective in the protection of human rights and

apply the existence of a norm, a court should view its role as critical in the development and enforcement of international law.<sup>245</sup> Customary law governs the conduct of states in the absence of controlling treaty law.<sup>246</sup> According to Professor Fisher, "one of the best ways to increase initial respect by a government for the rules of international law is to weave those substantive rules into domestic law;" domestic courts, he argued, are in a unique position to evaluate and enforce international obligations.<sup>247</sup>

A court asked to apply a customary norm is faced with the difficult task of determining its existence.<sup>248</sup> However, because customary law is part of the law of the United States,<sup>249</sup> "it need not be pleaded and proved as are issues of ordinary fact."<sup>250</sup> Accordingly, the court and counsel who seek evidence of a customary norm:

[M]ust follow some rather standard patterns of going through digests, opinions of text writers, law review articles, and docu-

alien-owned property, nor in the area of conflicting efforts of states to prescribe economic regulation. *Id.*

245. See Lillich, *supra* note 243, at 11. This author states: "Moreover, far too few commentators, much less judges, correctly perceive the domestic court as 'an agent of an emerging international system of order, an agent that accords precedence to the norms of international law when these norms come into conflict with the dictates of national policy.'" *Id.* (quoting Falk, *Interplay of Westphalis and Charter Conceptions of International Legal Order*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 32, 69 (R. Falk & C. Black eds. 1969)).

246. A. CASSESE, *supra* note 82, at 185. One may envision that multinational treaty law may eventually be developed to "codify" all customary law that arises through widespread state practice. However, Professor Cassese suggested that "[s]tates cannot afford to leave major points of agreement in the form of treaty regulations with the consequence that any State would be free to evade the treaty regulation merely by withholding ratification." *Id.* In fact, he pointed out that states have demonstrated an increasing tendency to enter into multilateral treaties for the dual purpose of undertaking specific obligations of the treaty as well as for clarifying general commitments which are binding on all states as customary international law. *Id.* at 183.

247. See R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW*, 212-35 (1981). The author stated that domestic courts are institutions that are generally respected. *Id.* at 212. Domestic courts may provide a forum for a plaintiff who was denied access to relief in his own country. *Id.* at 214. He further asserted that "if international law is to be treated as law affecting the legal rights and duties of people, it should be subjected to judicial scrutiny as are other laws." *Id.* at 228.

248. See A. CASSESE, *supra* note 82, at 181 ("it nowadays proves exceedingly difficult to ascertain whether a new rule has emerged, for it is not always possible to get hold of the huge body of evidence required," to evidence a norm created by a large number of diverse states).

249. For a discussion of *The Paquete Habana* as establishing customary law as United States law, see *supra* notes 22-31 and accompanying text.

250. See *Proceedings: Conference On International Human Rights in State and Federal Courts*, 17 U.S.F. L. REV. 1, 37 (1982). It is further stated that "[p]roving international law as law is, of course, a *legal process* based upon documentation and the arguments of counsel." *Id.* (emphasis added).

mentary evidence of state practice. Researchers must also review judicial opinions and weigh any conflicting practice to determine whether or not a customary rule of international law exists. Many international law and foreign law research tools are now readily accessible, although they lack the comprehensiveness and relative certainty of domestic law research tools.<sup>251</sup>

Through the constitutional and doctrinal limitations imposed upon the ability of domestic courts to decide matters of international law,<sup>252</sup> it is submitted that customary norms that will properly come before a court will be those for which abundant evidence exists.<sup>253</sup>

Domestic courts have been asked, however, to decide controversial issues of international law. As a notable example, courts have applied the process of interest balancing in determining the extraterritorial reach of United States law.<sup>254</sup> Widespread commentary urges that prescriptive jurisdictional conflicts can only be effectively resolved through international agreements rather than through domestic judicial determinations.<sup>255</sup> Where a governing international agreement is not present, a domestic court asked to decide a jurisdictional conflict may best serve the development of international consensus by deciding the issue according to the customary norm of reasonableness rather than by avoid-

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251. *Id.*

252. For a discussion of the constitutional and doctrinal limitations upon a court's ability to decide international matters, see *supra* notes 33-61 and accompanying text.

253. See *Sabbatino*, 376 U.S. at 428. The Supreme Court in *Sabbatino* suggested that domestic courts may most appropriately consider areas of international law when there exists substantial codification and consensus:

It should be apparent that the greater degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle . . . not inconsistent with the national interest or with international justice.

*Id.* For a further discussion of *Sabbatino*, see *supra* notes 45-51 and accompanying text.

254. For a discussion of extraterritoriality and jurisdiction to prescribe, see *supra* notes 195-98 and accompanying text. For a discussion of courts' consideration of extraterritoriality in antitrust regulation, see *supra* notes 200-24 and accompanying text.

255. See, e.g., Maier, *supra* note 232, at 594-97. Professor Maier stated: What appears to be a developing trend in the executive branch to attempt to resolve issues of this kind in advance by means of international agreement or at least on the basis of a prior communication is far preferable to leaving the interest balancing that is essential to any generally acceptable solution to the judicial forum. Continuing work on international agreements to address these issues is of considerable utility. One important effect will be the relieving of United States courts from a task that they are ill-equipped to carry out and that they have not, in most instances, effectively undertaken.

*Id.* at 597.

ing the issue or applying a domestic standard.<sup>256</sup> United States courts may provide an unbiased forum for determining and enforcing international law. The domestic process of entering into treaty agreements necessarily is subject to domestic political concerns. United States courts, in contrast, may function independently and ascertain norms with a view to a truly internationalist perspective.<sup>257</sup>

In sum, the cases examined in the areas of human rights, expropriation and extraterritoriality demonstrate that domestic courts have been inconsistent in determining and applying international customary norms. While United States treaty law is made through a domestic political process and provides a more certain basis for judicial decisions, customary law is the law of the United States in the absence of a controlling treaty or statute. Courts are equipped to ascertain the existence of an international custom and should apply controlling norms in an appropriate case. By so doing, courts will contribute to the development and enforcement of international law.

M. Erin Kelly

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256. See RESTATEMENT (No. 7), *supra* note 143, § 403(1)(a) (state may not exercise jurisdiction to prescribe law when the exercise of such jurisdiction is unreasonable; see also Zagaris & Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L L.J. 303, 355 (1985) (to harmonize jurisdictional conflicts "judicial decisions must expressly consider the needs of the international system").

257. See Kline, *An Examination of the Competence of National Courts to Prescribe and Apply International Law: The Sabbatino Case Revisited*, 1 U.S.F. L. REV. 49, 81-85 (1966) (courts may act to clarify long range interests of international community and act as "the most dispassionate of all possible decision-makers"). Courts are asked to defer to Executive Branch suggestions as to the outcome of a particular case which results in a practical limit of judicial independence. For a discussion of executive suggestions, see *supra* notes 52-61 and accompanying text. See also R. FALK, *supra* note 53, at 12. Professor Falk observed:

[I]t is contended that the operation of courts should be governed by the structural characteristics of international society rather than by transient foreign policy considerations. Such an orientation requires a very determined and explicit commitment to judicial independence. This is not a facile attainment in a world burdened with intense ideological conflict and distrust, but neither is it easy to envision a permanent nuclear peace maintained by anything short of a gradual substitution of global loyalties for national loyalties. It seems, at least, that we could trust our own courts to apply international law.

*Id.*; cf. Cardoza, *Judicial Deference to State Department Suggestions: Recognition of Perogative or Abdication to Usurper?* 48 CORNELL L.Q. 461, 498 (1963) (concluding that "executive suggestions reveal the political facts on which the legal conclusions have been based in the courts of the nation").